> "It should be remembered at the outset that, while a true cross-section is the ultimate ideal, it is by no means the Constitutional mandate. What is required is a jury selection system free of discrimination against properly cognizable groups." United States v. Butera, *supra*, 420 F.2d at 572.

As illustrated in Section I above, defendants have made no showing that they have been denied a cross section of the community in their grand jury venire, in violation of their right to equal protection.

Defendants' request for discovery of every fourth questionnaire mailed by the Clerk in November, 1969, and returned prior to May 10, 1970, and for a hearing on the questionnaire data, is denied for the reasons stated in Section A above. Defendants' motion to dismiss the indictment on the grounds that the grand jury was improperly constituted is also denied.

V. Motion for Discovery

Defendants Kahn and Teleprompter move for discovery and inspection pursuant to Rule 16, Fed.R.Crim.P.

1. The Government has consented to requests (a),[8] (b),[9] and (e).[10]

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[8] The transcripts of the testimony of defendant Irving Kahn before the grand jury.

[9] Any other relevant written or recorded statements by defendant Kahn within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the government, including, but not limited to, typewritten or handwritten statements, reports of interviews, notes of interviews, (whether signed or unsigned) and tape or wire recordings, whether made by an attorney for the government or by any other government employee.

[10] Any relevant results or reports of scientific tests or experiments made in connection with this case, and with the investigation leading to the indictment, or copies thereof, as are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the government, including, but not limited to, fingerprint reports, voice analysis reports and handwriting analysis reports.

2. Requests (d)[11] and (f)[12] are granted.[13] Defendant Teleprompter is entitled to the grand jury testimony of its officers, directors, agents and employees requested in (d). United States v. United Concrete Pipe Corp., 41 F.R.D. 538 (N.D. Tex. 1966). The court also grants request (f) as authorized by Rule 16(b), since it is reasonable and material. The grant, however, is only as to the prior criminal records of each person named in the indictment as a defendant or co-conspirator. Investigations made by the Government as to these persons are denied.

3. Requests (c)[14] and (g)[15] are denied. The Government is ordered to permit defendants Kahn and Teleprompter to inspect and copy transcripts of the grand jury testimony of any persons listed in request (c) who were employees, officers, agents, directors or attorneys of Teleprompter at the time they so testified. In all other respects request (c) is denied. The court is advised that defendants Tompkins, Deardorff and McKee may testify for the Government at trial. Their statements requested in

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[11] The transcripts of the testimony of any other officers, attorneys, agents, directors, or employees of defendant Teleprompter Corporation or its Johnstown subsidiary, Johnstown Cable T.V. before the grand jury.

[12] Any and all reports in the custody or possession of the government which set forth the prior criminal records or investigations with respect to each person named in the indictment as a defendant or co-conspirator.

[13] They are granted only to the extent noted in the opinion, of course.

[14] The transcripts of the testimony of Eugene Weinrich, Caywood Cooley, Walter Kinash, Samuel R. Di Francesco, Jr. and Walter Schier before the grand jury.

[15] Any and all written or recorded statements or confessions made by any of the other persons in the indictment named as defendants or as co-conspirators.

(f) are therefore statements by prospective Government witnesses, specifically exempt from discovery under Rule 16(b).

VI. Motion for a Bill of Particulars

Defendants Kahn and Teleprompter have moved for a bill of particulars.

1. The Government has consented to request number 1.[16]

2. Requests number 2 [17] and 5 [18] are granted.

3. Requests number 3,[19] 4,[20] and 6[21] are denied. These requests are inquiries into the legal theory of the Government's case, and hence not a proper aspect of a bill of particulars. See United States v. Schillaci, 166 F. Supp. 303, 307 (S.D.N.Y. 1958).

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[16] With respect to paragraph "1" of Count One of the indictment the names of the "other persons whose names are to the grand jury known" who the government will contend conspired with defendants to commit offenses in violation of 18 U.S.C. § 1952 and the names of such alleged co-conspirators who were unknown to the grand jury, but who have since become known to the government.

[17] With respect to paragraph "2" of Count One of the indictment, whether the government will contend that the "unlawful activity" referred to therein was bribery in violation of Title 18 §§ 4303 and 4304 of the Penal Code of the State of Pennsylvania and, if not, which Pennsylvania statutes were allegedly violated.

[18] With respect to Count Two of the indictment, the acts which constitute the alleged criminal activity, specifying the time and location of the acts.

[19] With respect to the entire indictment, whether the government will contend that the bribery alleged therein was part of an unlawful course of interstate racketeering.

[20] With respect to the entire indictment, whether the government will contend that any of the defendants were racketeers and, if so, the identity of such defendants.

[21] With respect to the entire indictment, on what legal basis the government contends that Teleprompter has committed a crime.

APPENDIX D

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January one thousand nine hundred and seventy-three.

Present:

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges,

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

J. HOWARD DEARDORFF, IRVING KAHN, ROBERT MCKEE, KENNETH TOMPKINS, TELEPROMPTER CORPORATION,

Defendants,

IRVING KAHN AND TELEPROMPTER CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX E

Relevant Statutes, Constitutional Provisions, and Rules

18 U.S.C. 1621. PERJURY GENERALLY

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. 1623. FALSE DECLARATIONS BEFORE GRAND JURY OR COURT

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary

to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Appendix E—Relevant Statutes, Constitutional Provisions, and Rules

18 U.S.C. 1951. INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101—115, 151—166 of Title 29 or sections 151—188 of Title 45.

18 U.S.C. § 1952 "INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Appendix E—Relevant Statutes, Constitutional Provisions, and Rules

N. Y. PENAL LAW 200.05 BRIBERY; DEFENSE.

In any prosecution for bribery, it is a defense that the defendant conferred or agreed to confer the benefit involved upon the public servant involved as a result of conduct of the latter constituting larceny committed by means of extortion, of an attempt to commit the same, or coercion, or an attempt to commit coercion.

FED. R. CRIM. P. 52 HARMLESS ERROR AND PLAIN ERROR.

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

ARTICLE 3, SECTION 2, CLAUSE 3. CRIMINAL TRIAL BY JURY.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Appendix E—Relevant Statutes, Constitutional Provisions, and Rules

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix E—Relevant Statutes, Constitutional Provisions, and Rules

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX F

Legislative History 18 U.S.C. 1623

Statement Senator John McClennan, introducing 18 U.S.C. 1623 on floor of Senate:

> "Mr. President, Title IV of S. 30 represents the best efforts of the committee to insure that truthful testimony will be given in our grand juries and courts.
>
> * * *
>
> "The last impediment to the telling of truth is that under present Federal law one is not allowed to recant, correct untruthful statements, and escape prosecution.
>
> * * *
>
> "Mr. President, Title IV encourages truth by facilitating the prosecution of those who have lied and by encouraging the correction of testimony without fear of prosecution. I am firm in my belief that this body should do everything in its power to make certain that there are no impediments to truthful testimony in the administration of justice in the Federal courts in all cases as well as the more serious organized crime cases." 116 *Cong. Rec.* 589 (1970)

Testimony of Ronald L. Gainer, Deputy Chief, Legislation and Special Projects, Criminal Division, Department of Justice, in support of 18 U.S.C. 1623:

> "Mr. Zelenko: Should Section 1621 of existing law remain on the books?
>
> "Mr. Gainer: Title IV is written to supplement the existing perjury provisions.
>
> "Mr. Zelenko: Title IV provides a much more substantial penalty, does it not—$10,000 fine or 5

years imprisonment, or both?

"Mr. Lynch: I believe that Section 1621 also has a 5-year penalty, but a lesser fine.

"Mr. Zelenko: How would the sections co-exist?

"Mr. Gainer: Section 1621 would cover proceedings that this does not."

Hearings on S. 30 Before Subcommittee No. 5 of the House Comm. on the Judiciary, 91st Cong. 2d Session 637 (1970)

APPENDIX G

Excerpts From Record

Trial Court's Instructions

"The crime of bribery under Pennsylvania law is also committed by anyone who gives or offers or causes to be given or offered any money . . . with the intent to influence that public officer with respect to any official act."

* * *

". . . It is sufficient if the paying party intended that the official be influenced in some way . . ."

* * *

"Mr. Kahn testified before the grand jury on January 27, 1971 that Mayor Tompkins used improper economic pressure to force Teleprompter Corporation into making a payment in order to secure a franchise to operate in Johnstown.

Tompkins and Deardorff denied having conducted themselves in this fashion. Whether they did or did not so conduct themselves is an issue of fact for you, the jury. But if you find that there was such pressure by Tompkins and Deardorff, and if you find that thereafter Kahn paid money because of such pressure, then you may consider the conduct of Tompkins and Deardorff as bearing on the issue whether Kahn, in making such payment or payments, had the requisite intent to influence action of a public official, which is an essential element of the offense of bribery under Pennsylvania law, as I have already described to you."

Defendants' Requested Instructions

"The defendants contend that the payments made to the Johnstown officials did not constitute a bribe, but were

paid as a result of extortion, under fear of injury to their cable TV franchise."

* * *

"You will recognize that whether the $15,000 payment was a bribe or an extorted payment presents an issue of fact.

"If you find that the money paid to the Johnstown public officials was paid as a result of extortion, you must find defendants TPT and Kahn not guilty on Counts 1-4. Moreover, if after evaluating all the evidence you have a reasonable doubt as to whether the moneys were paid as a result of extortion, you must find the defendants not guilty on those counts."

* * *

"If you find the evidence presented by the defendants raises a reasonable doubt in your mind as to whether the payments were made as a result of threats of injury to their franchise rather than with a specific criminal intent to bribe the officials in Johnstown in order to influence their official action you must find both defendants not guilty on Counts 1-4."

Colloquy

"Mr. Maloney: If your Honor please, that concludes the reading of the minutes of December 17th, 1970.

May the record reflect Exhibit 18 in evidence is the reappearance of Mr. Kahn before the grand jury on January 27th, 1971 after the appearance of the Mayor on December 22nd, and after the appearance of Deardorff on December 29th, I believe.

Mr. Fleming: Your Honor, before Mr. Maloney begins to read Mr. Kahn's testimony on the second occasion, might we approach the bench?

(653) The Court: Yes.

(At the side bar.)

Mr. Fleming: If your Honor please, Mr. Kahn read a statement in the grand jury which Mr. Maloney is about to read. That statement was submitted to Mr. Morvillo prior to Mr. Kahn's appearance in the grand jury and Mr. Morvillo made certain deletions from the statements before, as I understand the situation, he would allow Mr. Kahn to read it into the grand jury.

I was wondering, if your Honor please, if you would consider allowing these statements which were deleted by Mr. Morvillo to be put into the record at this time with regard to this testimony.

Mr. Maloney: I object to it as being hearsay. If Mr. Kahn wants to testify about him let him do so. All I have here is the grand jury testimony of Mr. Kahn.

The Court: As he actually gave it?

Mr. Maloney: As he actually gave it.

The Court: And this is a statement he prepared?

Mr. Fleming: A statement was submitted to Mr. Morvillo, requesting permission to make the statement. This ran over a long period, it started December 18, but the result was this statement which Mr. Kahn wanted to read in the grand jury. It was presented to Mr. Morvillo.

(654) You can see certain deletions were made before Mr. Kahn was allowed to give it. For example, in the second full paragraph, the second sentence reads—you will remember that I told you—

The Court: I understand it now.

Mr. Maloney says what he is about to read is the grand jury testimony, and you object to that?

Mr. Fleming: That's right.

The Court: I can't see any objection to his reading in the testimony as actually given. I don't understand the objection.

Mr. Fleming: My difficulty is that the deletions which were made which were a condition of allowing him to reappear and give a full statement on this matter—the deletions in fact change the substance—if your Honor would look at the two deletions at which I am pointing, the thrust of the statement, for example, here Mr. Kahn was prepared to say, and was not allowed to say by Mr. Morvillo: "Some of the facts I now discovered are inconsistent with what I said because I have now had a chance to refresh my recollection and review the records of Teleprompter."

"He wasn't allowed to say that."

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1191

IRVING B. KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1193

TELEPROMPTER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that the grand jury was improperly constituted and that the Travel Act, 18 U.S.C. 1952, was improperly applied. Petitioner Kahn in addition raises issues concerning the applicability and interpretation of the perjury statutes, 18 U.S.C. 1621 and 1623. Petitioner Teleprompter Corporation further contends that Kahn's perjurious statement before the grand jury should not have been admitted in evidence against it.

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on five counts of conspiracy and bribery in vio-

lation of the Travel Act, 18 U.S.C. 1952. Petitioner Kahn was also convicted of perjury, in violation of 18 U.S.C. 1621. Kahn was sentenced to concurrent terms of 5 years imprisonment and Teleprompter was fined a total of $10,000. The court of appeals affirmed in a lengthy opinion (Pet. App. A).

The facts are set forth in the opinion below (Pet. App. 2a-6a).[1] They show in essence that in 1966, Kahn, the founder, president, and chairman of the board of Teleprompter, acting on its behalf, gave a $15,000 bribe to three Johnstown, Pennsylvania city officials (the mayor and two city councilmen) to insure Teleprompter's retention of a local cable television franchise. Trips between New York and Pennsylvania, as well as the use of interstate telephone facilities, were shown to have been part of the scheme.

Later, before a federal grand jury, on December 17, 1970, Kahn denied that he had ever paid any money to any Johnstown officials. Upon being confronted with evidence of a payment of $7500, he claimed that the money had been paid to the mayor's son for a public opinion survey (Tr. 601-652). By December 29, 1970, the mayor and councilmen all had admitted in testimony before the grand jury that the $7500 payment, as well as two further payments, was in fact made to them as a bribe (Tr. 224-227). On January 6, 1971, Kahn told an assistant United States Attorney that in reality he had been the victim of an extortionate scheme (see petitioner Kahn's reply brief in the court of appeals, footnote at p. 32). Kahn volunteered to return to the grand jury on the condition that he be permitted to read a prepared statement without being cross-

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[1]References to "Pet. App." refer to identical portions of both petitioners' appendices.

examined by the government (see the government's brief in the court of appeals, footnote at p. 55). In that statement, which he was permitted to read to the grand jury on January 27, 1971, Kahn admitted knowing that the falsity of his prior denials of wrongdoing had already been exposed, but he claimed to have recalled facts, previously forgotten, which allegedly constituted a defense to the bribery charges.[2]

In response to petitioners' varied claims, we rely primarily on the extensive and thorough opinion of the court below; however, we make the following additional points:

1. Contrary to the claim of petitioner Kahn (Kahn Pet. 6-9) this case raises no conflict among the courts of appeals on the question whether the government has the discretion to prosecute perjury committed before a grand

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[2]Kahn's January 27, 1971, testimony before the grand jury, which was read into the record at trial, stated in part as follows (Tr. 658-661):

> Now, I have had a rather extensive search of the files made. We have looked through our old files in the warehouse and in the files of our Johnstown company as well as in the files of Teleprompter's office in New York. Also, I have spoken to present and former employees of Teleprompter and to our local attorney in Johnstown.
>
> From all of these investigations, we have discovered facts and records which I never knew of or did not recall when I testified here on December 17th.
>
> * * * * *
>
> I understand that others have testified in this matter and that I have been accused of bribing a public official in connection with the Johnstown franchise.
>
> Those who have accused me are criminals and coerced me into paying money. In short, they made it plain that they would effectively interfere with and obstruct our legitimate business in Johnstown unless they were paid money.

jury under either 18 U.S.C. 1621 or 18 U.S.C. 1623. The court below specifically stated (Pet. App. 21a) that it did not reach that question. Subsequently, in *United States* v. *Ruggiero*, 472 F. 2d 599, the Second Circuit held that the government was entitled to prosecute under 18 U.S.C. 1623 rather than 18 U.S.C. 1621 so long as, in doing so, it did not discriminate against any class of defendants. There is no conflict between *Ruggiero* and *United States* v. *Clizer*, 464 F. 2d 121 (C.A. 9), certiorari denied, 409 U.S. 1086, where the Ninth Circuit simply held that an indictment which tracked the language of 18 U.S.C. 1623 charged that offense even though it mistakenly referred to 18 U.S.C. 1621. See our memorandum in opposition to the petition for a writ of certiorari in *Clizer*.

2. As the court below noted, Kahn was not prejudiced by the government's decision to prosecute under 18 U.S.C. 1621 rather than 18 U.S.C. 1623 (Pet. App. 21a). The government's burden of proof under Section 1623 is less favorable to a defendant than the "two-witness" requirement applicable under Section 1621, and Kahn additionally obtained the benefit of consideration by the trial court of his alleged "recantation defense" under Section 1623(d) (Tr. 1179-1182).[3] Thus "Kahn got at least his due, if not more, on the evidence" (Pet. App. 21a).

Kahn, who raised his alleged recantation defense out of the presence of the jury in a motion for judgment of acquittal (Tr. 999-1008), now contends (Kahn Pet.

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[3]In a memorandum opinion denying Kahn's post-trial motions, after assuming *arguendo* that Section 1623(d) applied to Kahn and had not been waived, the trial court refused to bar his prosecution because the court found that Kahn's second statement was not a recantation and that, in any event, the falsity of his earlier testimony had already been exposed. We are lodging with the Clerk a copy of the trial court's memorandum opinion, which is reprinted at pp. 1040-1050 of the appellants' appendix in the court of appeals.

9-13) that this statutory bar to prosecution is a jury question and that the trial court was in error for failing to instruct the jury, *sua sponte*, that it could find that Kahn's perjury prosecution was barred by Section 1623(d). But since Kahn never requested jury consideration of or a jury instruction on this matter, he should not now be heard to complain that the issue was properly one for the jury. Rule 30, Fed.R.Crim.P.[4]

3. Teleprompter claims (Teleprompter Pet. 27-28) that there was insufficient proof that Kahn was acting as Teleprompter's agent on December 17, 1970 when he testified falsely before the grand jury. The court of appeals, after noting that Kahn was president, founder, chairman of the board and a major stockholder of Teleprompter at the time he testified about the company's franchise in Johnstown, properly dismissed this claim (Pet. App. 34a, n. 21). Kahn's December 17th grand jury statement shows on its face that Kahn was speaking for both himself and Teleprompter. At the outset of the grand jury hearing, Kahn identified the attorneys who had accompanied him as counsel to the corporation and stated that he had no personal counsel (Tr. 604). In response to questions, Kahn gave his home address, telephone number, occupation, explained "what Teleprompter Corporation is and what it does" (Tr. 605), and traced "the history of the operations of Teleprompter in Johnstown, Pennsylvania * * *" (Tr. 610). Kahn understood and answered all the questions as relating to both his and Teleprompter's actions (see, *e.g.*, Tr. 614, 622, 625, 627, 631, 635, 649-650). In addition, the evidence at trial showed, and Teleprompter

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[4]Since Section 1623(d) makes recantation a "bar" to prosecution, it is likely that it was correctly treated by the district court as a question of law. See Pet. App. 22a, n. 9.

conceded (Tr. 585-588), that as president of the corporation Kahn had the authority to represent and speak for the company. There is no evidence in the record that Teleprompter had withdrawn from Kahn the authority to speak for it before December 17, 1970.

4. Both Kahn and Teleprompter (Kahn Pet. 16-23; Teleprompter Pet. 7-24) contend that the courts below erred in their application of the Travel Act by interpreting Pennsylvania state law as not recognizing extortionate coercion as a complete defense to a charge of bribery. Their primary contention is that the court below failed sufficiently to investigate Pennsylvania decisional law and to analogize from New York law. They contend that the court below improperly imposed federal principles. However, what the court of appeals did was exercise its proper responsibility of determining what Pennsylvania courts were likely to do if faced with the issue. Petitioners conceded in the court below that the Pennsylvania courts had not decided whether extortion is a complete defense to a charge of bribery (Teleprompter's brief in the court of appeals, pp. 31, 32; Kahn's brief in the court of appeals, p. 52; Kahn's reply brief in the court of appeals, p. 17). Moreover, both courts below considered (Pet. App. 9a, 41a) the Pennsylvania decisions on bribery and extortion and determined that they provided no clear guidance on this issue. Futhermore, unlike the New York statute, Pennsylvania law does not provide any excuse for paying a bribe. Compare 18 Pa. Stat. 4303 and 4304, and 53 Pa. Stat 35911, with N.Y. Penal Law Section 200.05 There was thus ample basis for the holding of both courts below "that the Pennsylvania courts would not recognize proof of extortion as a complete defense to bribery charges" (Pet. App. 10a). There is no need for

this Court to review the lower courts' reading of Pennsylvania law.[5]

5. Petitioners' challenges to the jury selection plan (Teleprompter Pet. 24-27) were fully considered and properly rejected by both courts below (Pet. App. 27a-29a, 51a-62a), in accord with the decisions of other courts in similar cases *United States* v. *Blair*, 470 F. 2d 331, 333-337 (C.A. 5), certiorari denied *sub nom. Crews* v. *United States*, March 26, 1973 (No. 72-6021); *Chase* v. *United States*, 468 F. 2d 141 (C.A. 7); *United States* v. *Ross*, 468 F. 2d 1213 (C.A. 9); *United States* v. *Guzman*, 468 F. 2d 1245 (C.A. 2).[6]

For the above reasons and the grounds set forth in the opinions below, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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[5]Petitioner Kahn further contends (Kahn Pet. 13-16) that the Travel Act prohibits only "racketeering" and that he is not a racketeer. This contention was fully considered and rejected by the courts below. See Pet. App. 25a-27a, 45a-50a.

[6]Petitioners now contend that it was "fundamental error" (Teleprompter Pet. 24) for the trial court to deny their request for a hearing to present questionnaire data on the issue of grand jury composition. However, petitioners' request for discovery of the questionnaire data was properly denied by the district court (Pet. App. 51a-62a), and therefore no purpose would have been served by holding the hearing.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

Supreme Court, U.
FILED
APR 27 1973
MICHAEL RODAK, JR.,C

No. 72-1191

IRVING B. KAHN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF IRVING B. KAHN, PETITIONER

RALPH WIENSHIENK, ESQ.
Attorney for Petitioner,
Irving B. Kahn
10 East 40th Street
New York, New York
212 697-3760

PHILIP MANDEL
BERNARD ROTHMAN
and
PETER FLEMING, JR.
JOHN E. SPRIZZO
100 Wall Street
New York, New York
Of Counsel

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I. Replying to Government's Opposition to Petitioner's Perjury Point

1. The Memorandum in Opposition misinterprets the record and also begs the question when it asserts that no recantation defense was available to Irving Kahn because he recanted after it became manifest to him that the falsity of his prior statement "has or will be exposed." The record is misinterpreted because the government's summary of facts omits to state that the correction of Mr. Kahn's original testimony began in a meeting between Mr. Kahn's attorney and the prosecutor on December 18, 1970, *before* the confessions of Tompkins and Deardorff to the grand

jury on December 29,* and the process of correction continued until January 27 when the prosecutor permitted Mr. Kahn to make a corrective statement to the grand jury. (See, Kahn's Reply Brief below, pp. 31-32, including footnote p. 32.) The question is begged because the trial of the case under Section 1621—the old perjury statute, which contains no recantation defense—precluded development of evidence on the issue of recantation, including the question of whether Kahn recanted before or after it was manifest that the falsity was discovered.

As we pointed out in our Petition this issue raises the factual questions as to *what* was known to Mr. Kahn at various times, as well as the question of *when* the recantation was actually made. The Memorandum in Opposition assumes, without basis, that Mr. Kahn somehow knew immediately of the secret testimony given by Deardorff before the grand jury. In effect the Memorandum in Opposition invites this Court to make the same mistake as the Court of Appeals, namely to decide factual issues which could not be presented at the trial because prosecution of the case under the wrong statute excluded those issues. Further, the Memorandum in Opposition ignores our argument that these factual issues must be determined by the jury rather than the court.

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* See Colloquy at the trial in which the following statement made by Mr. Kahn's counsel was not denied by the prosecutor: "Mr. Fleming: A statement was submitted to Mr. Morvillo, requesting permission to make the statement. This ran over a long period, *it started December 18,* but the result was this statement which Mr. Kahn wanted to read in the grand jury. It was presented to Mr. Morvillo." (Appellants' Appendix in Court of Appeals 644a) (emphasis added).

2. The Memorandum in Opposition as well as the Court of Appeals' opinion asserts that Kahn obtained "the benefit of consideration by the trial court of his alleged recantation defense." This argument overlooks the fact that erroneous trial of the case under Section 1621 prevented development of the relevant facts, and also overlooks our basic argument that the jury and not the trial judge must make such a determination of fact.

Furthermore, we feel constrained to point out that in fact the trial judge at no time purported to determine the merits of a recantation defense. During the trial the court ruled that the prosecution had the right to elect to proceed under Section 1621, and that the recantation defense provided by Section 1623 had no application to the case. At the time of post-trial motions the trial court reiterated this ruling, saying:

> "With respect to this count, Kahn's first claim is that the government proceeded under the wrong statute, indicting Kahn under 18 U.S.C. Section 1621, instead of under 18 U.S.C. Section 1623, thereby depriving him of a defense to this count. This argument was ruled on by the court from the bench, adversely to Kahn, during trial, when the objection was made for the first time." (Appellants' Appendix in Court of Appeals 1042a).

The language apparently relied upon by the Memorandum in Opposition to support its claim that the trial judge considered the merits of the recantation defense appears at 1043a of Appellants' Appendix in the Court of Appeals. Read carefully in context it is clear that this language was merely the trial court's response to an evidentiary argument that in view of the policy considera-

tions underlying Section 1623 a recantation should not be admissible as proof of falsity of the original statement even in a Section 1621 prosecution. In this connection the court in a post-trial motion merely said that on the truncated trial record it was "not entirely clear" that Kahn would have prevailed on his recantation defense were Section 1623 applicable.

3. The Memorandum in Opposition is likewise in error in stating that the defense failed in its duty to request "jury consideration of or a jury instruction on this matter. . . ." (Memorandum in Opposition p. 5). Although the trial court's ruling that Section 1621 was the appropriate statute relieved the defense of such a duty, in order to protect the record, the defense nevertheless made a request to charge on the defense of recantation adapted from the language of Section 1623. (Appellants' Appendix in Court of Appeals 1033a). This request was denied by the court on the ground that Section 1621 not Section 1623 was the appropriate statute. (Appellants' Appendix in Court of Appeals 975a-976a).

4. The Memorandum in Opposition is in error in attempting to deny that there is a conflict between the Circuits as to whether the prosecution may elect to proceed under either Section 1621 or Section 1623. The first case to be considered by a Circuit Court of Appeals was *United States* v. *Clizer*, 464 F. 2d 121 (9th Cir.), *cert. denied*, 409 U.S. 1086 (1972). In that case the prosecution proceeded under Section 1621. Upon appeal it was argued that the two witness rule imposed by Section 1621, but dropped in Section 1623, was not satisfied by the evidence. The Court of Appeals held that the enactment of Section 1623 abolished the two witness rule in cases "to which 18 U.S.C. Section

1623 applies," namely, perjury before federal courts or grand juries. The decision in *Clizer* necessarily negates the notion that the prosecution has a power to elect between the two statutes, because despite the "election" of the government to prosecute under Section 1621, the Court of Appeals judged the case under the provision of Section 1623, and expressly stated that Section 1623 "changed the rule." The court in *Clizer* held that Section 1623 was the sole statute now applicable to perjury before federal courts and grand juries and that identification of the charge in the indictment as a violation of Section 1621 was immaterial so long as a violation of Section 1623 was proved.

In *United States* v. *Ruggiero*, 472 F. 2d 599 (2d Cir. 1973), Petition for Certiorari filed March 24, 1973, No. 72-1300, the Court of Appeals for the Second Circuit ruled that Section 1621 and Section 1623 overlapped and that "the Government is entitled to choose among them . . ." so long as there is no discrimination between classes of defendants. In so ruling the Second Circuit disagreed with the conclusion of the Ninth Circuit in *Clizer* that only Section 1623 was now applicable to perjury before federal courts and grand juries.

In the instant case, which was decided after *Clizer* and before *Ruggiero*, a different panel in the Second Circuit expressed grave doubts as to the government's right to elect between the two statutes, but did not reach the issue. Thus, in the first three cases to reach the Courts of Appeals the results were one heads, one tails, and one coin balanced on edge.

As we point out in our Petition, the Court of Appeals strained too far in an attempt to avoid reaching this issue, and thus committed the error of attempting to de-

termine upon appeal a factual issue as to which the evidence could not be developed at the trial, which factual issue in any event must be constitutionally determined by a jury and not by the court.

II. Replying to Government's Opposition to Petitioner's Travel Act Point

In our Petition we contended that a proper interpretation of the Travel Act precluded the conviction of a *victim* of extortion, especially when considered in connection with its sister statute, 18 U.S.C. 1951, which was enacted for identical anti-racketeering purposes. It is clear that under Section 1951 a victim of extortion is not criminally punishable and there is no sound justification for construing the Travel Act to permit a contrary result.

The government in its opposition to our Petition has not seen fit to respond to that claim, presumably because it is not able to make any persuasive response. Similarly, the Court of Appeals, perhaps for the same reason, did not discuss the merits of this claim. This silence can only serve to underscore the need for this Court to decide whether sound principles of statutory construction, and the dictates of due process, allow the prosecutor, at his sole discretion, to determine whether a businessman is a victim or a criminal depending upon which of these two sister statutes—intended to serve the same end—is employed by the prosecutor on a particular set of facts.

The government has also given no adequate response to our claim that the problems raised by a Section 1952 prosecution on facts where there are substantial contacts with more than one state required a more extensive considera-

tion of applicable state law than was provided by the courts below. This is especially true, where, as here, in one of those states, New York, it is specifically provided that extortion is a defense to bribery. (See New York Penal Law, Section 200.05, Kahn Petition, pp. 18-19.) Such an analysis would have required the court to conclude that if Pennsylvania law could not be determined, then New York law should have been applied. It was therefore error for the court below to conclude that lack of definitive Pennsylvania precedents permitted the court to look to authorities under a federal bribery statute, 18 U.S.C. 201.

Finally, there obviously is no merit to the government's assertion with regard to Pennsylvania law that the *absence* of "clear guidance" under Pennsylvania law provides "ample basis" for the lower courts' holding that petitioner Kahn could not defend against the Travel Act charge on the ground that the payment in question had been extorted (Memorandum in Opposition p. 6). This amounts to an argument that the *absence* of clear state law permits and indeed entitles a federal court to find that a state court would *restrict* the defense of a criminal case in the harshest way available. This approach not only "resurrects the shadow of the pernicious doctrine of common law crimes" (See Teleprompter's Petition, p. 20), but is flatly contrary to Pennsylvania's basic policy which favors that interpretation of state criminal law which "operates in favor of life and liberty." *Commonwealth* v. *Exler*, 243 Pa. 155, 162, 89 A. 968, 971 (1914); Kahn's Petition, p. 17.

The government presents no answer whatsoever to Kahn's point that the Travel Act does not apply in any event to conduct by a businessman which is isolated and is admittedly unrelated to racketeering, except to say that

Kahn's contention in this respect was "fully considered and rejected" by the courts below (Memorandum in Opposition p. 7, n. 5).

* * *

We believe that the government's failure to deal with the serious issues raised by Kahn's Petition springs from its inability to do so in any persuasive manner. Its response almost certainly is designed to mask this inability and is itself perhaps the best evidence of the need for this Court to set applicable standards of law and analysis for Travel Act and perjury prosecutions such as this.

Dated: New York, New York
April 26, 1973

Respectfully Submitted,

RALPH WIENSHIENK, ESQ.
Attorney for Petitioner,
Irving B. Kahn
10 East 40th Street
New York, New York
212 697-3760

PHILIP MANDEL
BERNARD ROTHMAN
and
PETER FLEMING, JR.
JOHN E. SPRIZZO
100 Wall Street
New York, New York
Of Counsel